UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JUSTIN E. BAERGA, *et al.*,

Plaintiffs,

v. 21 CV 5762 (PAC)

CITY OF NEW YORK, *et al.*,

Defendants. Conference
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New York, N.Y.
December 12, 2022
3:30 p.m.

Before:

HON. PAUL A. CROTTY,

District Judge

APPEARANCES

BEDLOCK LEVINE & HOFFMAN LLP
Attorneys for Plaintiffs
BY: LUNA DROUBI
JONATHAN C. MOORE
-and-
NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.
BY: RUTH LOWENKRON
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-and-
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SYLVIA HINDS-RADIX
Corporation Counsel for the City of New York
Attorney for Defendants
BY: ALAN SCHEINER

(Case called)

MS. DROUBI: Luna Droubi, Bedlock Levine & Hoffman, for the plaintiffs.

MR. MOORE: Jonathan Moore, Bedlock Levine & Hoffman, for the plaintiffs.

MS. van DALEN: Marinda van Dalen, New York Lawyers for the Public Interest, for the plaintiffs.

MS. LOWENKRON: Ruth Lowenkron, New York Lawyers for the Public Interest, for plaintiff.

MS. MARASHI: Jenny Marashi from Marashi Legal for plaintiffs.

THE COURT: Who is going to be speaking for the plaintiffs?

MS. DROUBI: I will, your Honor.

THE COURT: For the city.

MR. SCHEINER: Alan Scheiner, your Honor, from the Corporation Counsel's office.

THE COURT: Ms. Droubi, you want --

MS. DROUBI: I'm sorry. I missed what you stated.

THE COURT: Do you want to address the issue?

MS. DROUBI: Yes, your Honor.

First and foremost, we would ask the city to consent to stay of the pending new policy until the Court has decided the preliminary injunction motion. We do so so that we could gather some necessary information, which is what's currently

before the Court on a motion -- a premotion letter seeking expedited discovery for the sole and limited purpose of gathering information about this new policy.

We do so as a matter of urgency because the policy is, as we understand it, being implemented as we speak, which will affect thousands of New York City residents who have or are perceived to have mental disabilities, and they live in constant clear as a result of the lowering of the standard for involuntary hospitalizations and detentions. We believe that we would like certain information in order to support our motion --

THE COURT: Has anybody been taken to the hospital as a result of this new policy?

MS. DROUBI: This is one of the items of information we are seeking in our request for expedited discovery to understand --

THE COURT: Do you know of any?

MS. DROUBI: We do not currently know of any, but we do know that trainings were set to take place -- we understand from the mayor's statement that trainings are taking place with NYPD officers as we speak, and what these officers are being told and when they are told to implement them means that this could take effect as we speak.

So we believe that expedited discovery for information about exactly how many individuals this will be affecting, when

the rollout took place, what the rollout will look like is necessary for us to be able to put forward to the Court our request. We would ask for a supplement to our existing preliminary injunction motion to provide the Court with additional information as to why this is a matter of urgency.

THE COURT: Mr. Scheiner sent me a letter today.

MR. SCHEINER: Yes, your Honor.

THE COURT: December 12.

I am not finished with Ms. Droubi.

That says that the initiative of November 29 is an application of existing law rather than a departure from it.

MR. SCHEINER: Yes, your Honor, exactly. That's stated --

THE COURT: I'm not finished yet.

MS. DROUBI: I'm sorry, your Honor. I could not understand.

THE COURT: Let me repeat.

Mr. Scheiner takes the position that the application, what was done by the mayor was an application of existing law rather than a departure from it.

MS. DROUBI: Our position is, your Honor, that's not the case. This is a lowering of the standard in which a police officer, who is not a mental health professional, is now tasked with simply looking at an individual, and that perception of an individual being mentally disabled is now sufficient to

involuntarily commit them against their will, even if there was no indication at all if there is an imminent violent act, which was the prior standard. Now you simply have to look mentally disabled to an NYPD officer without training in order to be involuntarily detained.

THE COURT: What, in your view, in the merits statement changes what was the existing policy?

MS. DROUBI: His statement indicates that a person specifically needs to look unkempt, look a certain way, act a certain way and that should be sufficient for them to not be able to take care of themselves and that in and of itself is grounds for an involuntary commitment to a hospital.

THE COURT: I'll hear from you now, Mr. Scheiner.

MR. SCHEINER: Yes.

First, I want to note that I believe the plaintiffs, once again, are procedurally a little out of line because this conference was scheduled as a discovery conference on their application regarding expedited discovery. Your Honor directed that it should be treated as such, as a premotion conference, and that, in addition, that the parties should confer about a briefing schedule on the plaintiffs' motion for preliminary injunction.

It sounds to me like the plaintiffs are now asking your Honor to enter a TRO today, which is contrary to your Honor's instructions and not something that I discussed -- that

the plaintiffs raised when I last spoke to them on Friday and exchanged emails with them over the weekend.

Once again, it's kind of, you know, trial by surprise and ambush, but I'm happy to speak to the merits of what plaintiffs' counsel has said.

THE COURT: I wish you would.

MR. SCHEINER: The mayor's statement on its face quotes 9.41, which is the applicable law, which mandates that police officers and peace officers specifically are authorized to take people into custody when they appear to be mentally ill and are conducting themselves in a manner that presents a risk of serious physical harm.

THE COURT: Is that Commissioner O'Sullivan's memorandum of February 18, 2022?

MR. SCHEINER: That's actually the state's memorandum that preceded the mayor's statement by several months.

THE COURT: Did anybody file any litigation over that particular document?

MR. SCHEINER: I'm not with the state, but not that I'm aware of, your Honor. It was not subject to any challenge that I'm aware of.

THE COURT: Is there a difference between what this letter seems to authorize, interpretive guidance for the involuntary and custodial transportation. Does that differ from the mayor's statement of November --

MR. SCHEINER: No, your Honor. Sorry, were you done with your question?

THE COURT: Yes.

MR. SCHEINER: No, there is no difference, your Honor.

In terms of the substance of the standard that the mayor is articulating, it's exactly the same. It's the legal standard that has existed in New York State for decades and which is embodied not only in the statute, but in case law.

What the mayor added in his statement was that he was going to have additional training not just for the NYPD, but for other city officials and mental health professionals to advise them about this aspect of law, that this aspect of law is not new. It has always been there. It's basically just a supplement to existing training. That is what the mayor was trying to focus on.

There were other related programs that are part of this initiative, but the core of it is simply to highlight this aspect of the existing law that 9.41 has never required that the person being taken into custody solely to be transported to a hospital for evaluation, not involuntarily committed, but just to be transported, never required that they be violent at the time that they are taken into custody or threatening violence. It required that they be conducting themselves in a manner that created a danger of serious injury. That's been upheld by numerous courts.

Plaintiffs have even disclaimed that they are challenging that standard. They say they acknowledge that standard in their briefs. But then they make -- your Honor, I can't put it any other way, but a false allegation that the city is authorizing its officers now -- and they claimed this before, that this was so before, even though it wasn't true then either -- it was authorizing its officers to take people into custody just because they appear to be mentally ill. It's clearly not the case. No matter how many times they want to repeat the false statement, it doesn't make it true. It's right there in the exhibit that they filed with your Honor.

They do cite, I'll anticipate, something they are likely to bring up, a comment by Mayor Adams at a press conference referring to a man who was shadowboxing on the street. That's not part of the policy. That's a comment at a press conference. In fact, there was a question about it and it was explained. That was not meant to be a basis for taking anyone into custody, that the standard remains always the same, there has to be probable cause to believe that the person is conducting themselves in a way that creates a danger of serious physical harm.

The plaintiffs want a different rule. The plaintiffs say, it should be violence, should be that there is an imminent danger of violence by themselves against themselves or against others. That's just not the law, and they don't cite any case

to support that standard which, frankly, they have just made up.

Your Honor, this is not only the centerpiece of this recent action for which, as we alluded to in our letter, the plaintiffs don't have standing because your Honor's question I think spoke somewhat to that, that, first of all, there is no evidence that anyone has been taken into custody unlawfully as a result of this initiative. As far as anyone in this room knows, the initiative hasn't changed anything.

THE COURT: What about Mr. Greene's statement that he is afraid to go out on the street?

MR. SCHEINER: Your Honor, Mr. Greene's fear does not create standing. If that were the case, then the inevitable flood gates --

THE COURT: His most recent interaction with the police department was in 2020, as I understand it.

MR. SCHEINER: That was before this initiative, your Honor. He is saying that his experience in the past creates standing to challenge this initiative, which is not part of his claim in this case. It's not part of the amended complaint because, obviously, it's new. He is saying that because he was taken into custody under different circumstances in the past, that he has standing to challenge a new initiative because he might be taken into custody in the future.

And there is substantial case law, like *Lyons* from the

Supreme Court, which we cited which says, you need a lot more than the fact that something bad happened to you before, and that it might happen to you again, to have standing to have a prospective injunction, especially, your Honor, against a facially valid policy, facially constitutional initiative. I want to point out, this is not an order. This is a statement and a directive to city agencies to implement what's stated there in terms of training.

But to go back to the standing issue, when you have a facially valid statement by the government and no instance of a violation of the Constitution caused by that statement, then I don't think these plaintiffs or frankly any other have standing.

The fact that one of the plaintiffs who made this petition and others who are on the complaint are organizations does not give them standing. These are organizations that are principally directed towards advocacy for the mentally ill, which is fine and laudable. But the fact that they engaged in that advocacy does not give them standing. And the fact that they have had to spend time and resources on this matter because they are advocates for the mentally ill does not give them standing. There is clear case law in that as well.

What we have is essentially a new action for which the plaintiffs have no standing and, therefore, this motion is without jurisdiction, which is part of what we want to

litigate, one of the issues we think should be litigated carefully, not here today, but -- because there is no emergency, and there is no need to rush that determination. There are serious issues raised by this.

THE COURT: Let me here from Ms. Droubi, please.

MS. DROUBI: Your Honor, the city is now representing that this isn't a new policy, and yet the mayor issued a press conference announcing a new initiative, a new policy that was going to be rolled out, as we speak, which lowers the standard of how a police officer can look at an individual and determine that they have a disability and are unable to take care of themselves.

THE COURT: Where was that in the papers?

MS. DROUBI: We provided your Honor with a transcript of the mayor's press conference, as well as a document attached --

THE COURT: Where is it in the transcript of the press conference?

MS. DROUBI: One moment, your Honor.

Your Honor, I think the best place we can highlight this is found in Moore declaration, Exhibit 1, which is the directive where the city has taken the position that a person who appears mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed, can be now taken into custody or involuntarily

committed by NYPD officers. That's Moore declaration, Exhibit 1 at 1.

THE COURT: Section 9.41 authorizes a peace officer or police officer to take into custody for the purpose of psychiatric evaluation an individual who appears to be mentally ill and conduct themselves in a manner likely to result in serious harm to himself or others.

Is that the portion?

MS. DROUBI: It goes on to say: The display of an inability to meet basic living needs, even when no recent dangerous act has been observed, can meet that standard.

THE COURT: Is that the city policy or is that the policy of the department of mental health?

MS. DROUBI: That's the city's new interpretation of the policy. That was launched -- that caused a press conference to take place, the directive to be issued, and now trainings to be rolled out to NYPD officers who are now going to be on the front lines of policing mental health in the streets of New York by simply looking at an individual and determining that they look unable to meet their basic living needs just by the way they look.

THE COURT: The question that I have is, is that a change from the existing policy of the commissioner of mental health, the state commissioner of mental health and the state and the city?

MS. DROUBI: Yes. We believe that they are not interpreting the guidance which was guidance that was provided by the office of mental health. That was guidance. They are misinterpreting that guidance by lowering the standard.

THE COURT: What is the existing policy?

MS. DROUBI: The existing policy that's in the patrol guide requires imminent harm to oneself or others. That's what's being taken away. Now, instead of imminent harm, they are saying, if you look unable to take care of yourself, that is imminent harm. That's a lowering of the standard.

THE COURT: Mr. Scheiner.

MR. SCHEINER: Yes, your Honor.

That assertion is also false. The patrol guide defines -- and I know plaintiffs take offense to this definition, but it is what's in the documents for many years. But it defines the persons subject to removal under 9.41 as emotionally disturbed persons and it defines them thus: A person who appears to be mentally ill or temporarily deranged and is conducting himself in a manner which a police officer reasonably believes is likely to result in serious injury to himself or others. There is nothing in this document requiring that somebody be presenting an imminent danger of serious harm in order to be taken in pursuant to 9.41.

The reason why the mayor issued this initiative and these guidelines is because, as a matter of discretion and

practice, the feeling is that the police department and others, other mental health professionals who have this authority under section 9.58, were not applying the law in the most complete extent. In other words, they were exercising their discretion to not take action when they could. That was considered by the person elected to make the difficult policy decisions necessary to keep all New Yorkers safe. There is nobody in this room like that.

But that person and the people who are appointed by him to do that made the decision that people should not be exercising their discretion in this way when 9.41 authorizes people to be cared for who are in serious danger. And the guidance, the initiative gives specific examples. It says: The following circumstances could be reasonable indicia of an inability to support basic needs.

THE COURT: Where are you reading from?

MR. SCHEINER: I'm reading from the plaintiff's Exhibit 1, 112-1, mental health involuntary removals. That is the written summary of the mayor's initiative, of the guidance issued by the mayor. That is an exhibit to Jonathan Moore's -- Exhibit 1 to Jonathan Moore's declaration.

THE COURT: Let me see if I can find Mr. Moore's statement.

Has the state mental health law changed in any regard, aspect?

MR. SCHEINER: No, your Honor.

THE COURT: Is that right, Ms. Droubi? Has the state law changed?

MS. DROUBI: I'm sorry, your Honor. The state law has not changed, no.

THE COURT: The city is in compliance with the state law?

MS. DROUBI: No. This new policy certainly is not in compliance with the state law, your Honor. Our position is they are misinterpreting state law and that this loosening or lowering of the standard that somebody, simply because they can't meet their basic needs and that's it, is not what the state guidance provides.

THE COURT: Mr. Scheiner.

MR. SCHEINER: Yes, your Honor.

Our initiative does not say that they can be taken into custody just because they can't meet their basic needs. What it says is that that's one example if that causes them to be in danger of serious harm, which is the state standard according to the New York State Office of Mental Hygiene in their guidance which was adopted by the city and reading from the official statement of this initiative.

THE COURT: Is it fair to say it was adopted by the city? The city doesn't have much choice other than to comply with the state mental health requirements, doesn't it?

MR. SCHEINER: Your Honor, it wasn't a regulation. It was interpretive guidance of what the law means. So the city decided to follow the guidance to publicize it, to incorporate it into its training. That's what the initiative is all about.

And the state didn't invent this guidance. It's in the case law which we cited to your Honor in our first letter, on December 8, 2022, on page 2. We cited *Boggs v. Health and Hospitals Corporation*, 132 A.D.2d 340. That's New York Appellate Division. I think 1st. I'm sorry if I omitted that from the citation. 1987.

It says: It is well established in this state that a person may be involuntarily confined for care and treatment where his or her mental illness manifests itself in neglect or refusal to care for themselves to such an extent that there is presented "serious harm" to their own well-being. That's a statement of law in their courts. The plaintiffs have not cited any case law to the contrary, your Honor. They have simply invented the idea that this standard either doesn't exist or is contrary to the Constitution or contrary to the Americans with Disabilities Act. There is no authority for that whatsoever. To come in and ask for a TRO, of all things, or emergency discovery to interfere with the operation --

THE COURT: We have a pending lawsuit. What's wrong with their making a motion in the pending lawsuit?

MR. SCHEINER: Your Honor, they have made this motion

essentially as part of the pending lawsuit, but the pending lawsuit does not concern this initiative. None of the plaintiffs were injured. They couldn't possibly have been injured as a result of this initiative.

The plaintiffs' papers make some reference to this being relevant to a *Monell* claim, but it's not because, of course, *Monell* is a specious and vicarious liability for acts that have occurred in the past. There is no time travel. That's one problem with that theory.

The other is that although plaintiffs refer to something called *Monell* violations, there is actually no such thing, because *Monell* is not a standard of liability in and of itself. It's a standard of vicarious liability. It doesn't define constitutional violations. It's inappropriate to say it's part of their *Monell* case.

If you look at their request for relief, which we think on its face is invalid for reasons we said in our motion to dismiss and others that we can address in briefing this preliminary injunction motion, they ask for basically a complete redesign of the city's policy with regard to the mentally ill. They ask your Honor to order the city to hire people to work in what are essentially new governmental agencies.

They ask your Honor to order that the police may not carry out their state-mandated function of protecting the

mentally ill by taking them into custody for psychiatric evaluation under 9.41. That's not relief that we believe they are entitled to.

With respect to this prospective relief about a brand-new initiative, we think they don't even -- for reasons that are even greater than the standing arguments we have made in our motion papers already on the complaint, we think --

THE COURT: My question is a little bit different. My question is, what is wrong -- there is a pending lawsuit in this case, right, Justin Baerga v. the City of New York, 21 CV 5762, started about a year ago. What's wrong with making a motion in that case?

MR. SCHEINER: Your Honor, they can make the motion. We argue they don't have enough standing for it, but they can make it, and we will respond to it.

What I'm saying is, it's not an emergency. It doesn't call for extraordinary relief of your Honor enjoining anything that the city is doing now.

And to return to the initial issue this conference was scheduled for, it doesn't call for emergency discovery. Because if their argument has any validity at all, it has to be a facial challenge to the initiative. It can't be as an-applied challenge --

THE COURT: Should the plaintiffs amend their complaint so that it incorporates the current allegations?

MR. SCHEINER: I think your Honor, as a matter of good housekeeping, yes, they should. Because, otherwise, they are making a motion that's not within the corners of their complaint. Couldn't possibly be. Their complaint is a year old at this point.

Yes, your Honor. It is not within the scope of the amended complaint. It's essentially a motion about a new thing, which is the initiative.

If I could respond --

MS. DROUBI: Your Honor, can I respond to that point?

THE COURT: Yes.

MS. DROUBI: Your Honor, there is a pending putative class action with an injunctive class on a policy, the patrol guide, with respect to the way the city treats individuals they deem emotionally disturbed. This is directly relevant to our case. The city did not provide us with this change in policy in advance.

We believe it necessary to halt this illegal policy of lowering of the standard, which is why we came into the court on an urgent basis. We believe we have standing. We have individuals who have been harmed by this exact policy and will be harmed.

THE COURT: Who are the individuals? Not Mr. Greene.

MS. DROUBI: Mr. Greene is one of our plaintiffs.

THE COURT: I know he is one of your plaintiffs, but

does he really have a grievance? He complains about conduct that took place in 2020. He says he's afraid to go in the street today.

MS. DROUBI: He has been harmed by the existing patrol guide EDP policy, which is now imminently about to change, and it is a loosening of the standard. So simply him walking on the streets --

THE COURT: How can you say it's about the change?

MS. DROUBI: His fear of imminent harm as he walks down the street with his mental disability and that that might prompt another police act is his standing. He is now walking the streets of New York with a mental disability, and that is all it takes for a police officer, with the guidance provided by the mayor and what will be --

THE COURT: We can agree that that hasn't happened yet.

MS. DROUBI: We know that the city has announced the change effective immediately and that trainings are happening as we speak. So police officers are getting this guidance that they can look at an individual who has a mental disability who seems as though they might not be able to take care of themselves and, on that basis alone, that officer can sweep them off the street. That's why he has standing. He has been affected by this policy in the past, and he will be affected by this policy and these changes in the future.

THE COURT: Mr. Scheiner.

MR. SCHEINER: Yes, your Honor.

Just to respond to the repeated false allegation that the city is authorizing or encouraging police officers to take people into custody just because they appear to be mentally ill, it's completely false for the reasons I pointed out. I want to point out some more reasons.

The written guidance which the plaintiff submitted to your Honor, the mayor's statement, says that the following circumstances could be reasonable indicia of an inability to support basic needs due to mental illness that pose harm to the individual: Serious untreated physical injury, unawareness or delusional misapprehension of surroundings or unawareness or delusional misapprehension of physical condition or health.

THE COURT: Where are you reading from?

MR. SCHEINER: I'm reading from the Exhibit 1 to Jonathan Moore's declaration, document 112-1, titled mental health involuntary removals. It's near the bottom of the page.

There are specific examples in a document which I provided to plaintiffs' counsel voluntarily, even though we haven't consented to expedited discovery, which is the FINEST message that was issued to all members of the service in the NYPD about the initiative. That too gives specific examples.

It says: Police may also remove a person for an evaluation when the person appears mentally ill and incapable

of meeting basic human needs to such an extent that the person is likely to suffer physical injury or serious harm without immediate attention.

Plaintiffs want to ignore that whole clause, to such an extent that the person -- I'm sorry. May I complete my statement, your Honor?

THE COURT: Yes.

MS. DROUBI: I'm sorry.

MR. SCHEINER: To such an extent that the person is likely to suffer physical injury or serious harm without immediate attention. In this circumstance, a person's actions or inactions may be evidence of mental illness and inability to care for oneself, for example, an incoherent person may be unable to assess and safely navigate their surroundings, e.g., avoiding oncoming traffic or subway tracks, may suffer from a serious untreated injury or unable to seek out food, shelter, or other things needed for survival. These circumstances are likely to lead a person to suffer serious harm.

Your Honor, frankly, what the plaintiffs want, although they claim to be advocates for the mentally ill, I find that a little perverse because what they want is for the city to allow people to starve to death, bleed to death on the street, wander on subway tracks, wander into traffic. It makes no sense.

THE COURT: Please.

MS. DROUBI: Your Honor, may I respond to that?

THE COURT: Yes.

MS. DROUBI: Your Honor, first of all, that's not at all what we are saying. We are not asking -- what we are simply saying is, the police should not be the ones to look at an individual and, as this document that Mr. Scheiner just read, indicate that they are unable to assess and safely navigate their surroundings.

Who is to say what that means? Is mumbling to oneself sufficient to be unable to take care of oneself? An incoherent person, it's so broad and it's such a loosening of the term. To expect NYPD officers to be able to understand that without believing that somebody who is mumbling to themselves can just meet the standard now and be involuntarily committed, it's a dangerous lowering of the standard --

THE COURT: The police officer doesn't make a decision about involuntary commitment, does he? He makes a decision about transportation to a hospital.

MS. DROUBI: Right. Involuntarily taking them to a hospital against their will. That's the problem, is that they make that determination that they have to be forcibly taken to a hospital against their will. That itself is a restriction on their liberty because it causes detention and involuntarily hospitalizing them against their will.

MR. SCHEINER: Your Honor, the police have been called

upon by state law, and this has been constitutionally upheld, to make that determination for decades. They have to make determinations about probable cause all the time, including under 9.41, but of course also under the criminal law which has, in some cases, its own difficult-to-apply standards.

Nevertheless, somebody has to do it, and they are the people who are mandated to do it, with the assistance of EMS, by the way. When they do this, when they do a removal under the initiative and existing practice, it's done through EMS. EMS is called. EMS takes the person to the hospital with the officer for safety to make sure they get there.

This is something that we have to --

THE COURT: Your point of view is that nothing has changed as a result of Mayor Adams' press conference.

MR. SCHEINER: What's changed is that there is now further guidance for the police department and other agencies about circumstances --

THE COURT: What the police can do hasn't changed.

MR. SCHEINER: Correct. Yes, your Honor.

THE COURT: So the purpose of the press conference was to do what?

MR. SCHEINER: To announce the fact that the mayor is taking the initiative of providing further guidance to the agencies about what is permitted under current law so that they can take action to protect New Yorkers under circumstances that

the law permits.

To make an example, and I don't mean to trivialize what we are talking about, nonprosecution of fare jumping or when marijuana was illegal. Often, people were not prosecuted for violating laws which the police considered minor or which the prosecutor considered minor, for matters of resources or other reasons. That doesn't mean that it's unconstitutional to enforce those laws.

The mayor issued this guidance because it was perceived that officers were, perhaps out of ignorance, perhaps out of discretion, not utilizing -- officers and others were not utilizing 9.41 and 9.58 to the greatest extent that's permitted. That doesn't mean anyone is asking for maximum enforcement of the statute. It's simply making clear that there are circumstances that had been overlooked.

Part of the problem here is, we are talking about hypotheticals. That is why we think the plaintiffs don't have standing. Since we are here to talk about it, I'll give a hypothetical. I noticed a man on the subway the other day who was walking around on the tracks. I didn't talk to him. I don't know what he would have said if I had approached him as to, why are you on the tracks? Do you know that you're on the tracks? Do you know what the tracks are? I don't know.

But the police could ask those questions of that person, maybe before they got on the tracks, if they appeared

to be mentally ill and appeared unaware of their surroundings, behaving in a way that seemed to show that they were unaware of the danger.

THE COURT: Anybody can ask that question.

MR. SCHEINER: Yes, your Honor. But the police would ask that question in order to determine if there is probable cause to believe that the person is mentally ill and, therefore, unable to determine, unable to know that the tracks are dangerous and that they shouldn't climb onto the tracks to get a cigarette. They can make that determination based on common sense and their training. They have already had training in applying 9.41, of course. This is a supplement to that training to make clear that there are circumstances like this. What if the person --

THE COURT: How many police officers have received this training?

MR. SCHEINER: Under the initiative?

THE COURT: Yes.

MR. SCHEINER: Your Honor, it's just being rolled out this week. So probably --

THE COURT: Prior to the initiative.

MR. SCHEINER: Well, there was no training on the initiative prior to the initiative. All officers have received training --

THE COURT: Prior to the initiative being issued, what

was the training with regard to 9.41 and 9.58 and 9.37?

MR. SCHEINER: Your Honor, only 9.41 applies to the police, so that's what they would have received training on. And 9.41 training consists of an explanation of the mental health law and examples of when it can be applied.

There are materials I haven't brought with me, because that wasn't the subject of today's conference, but there is training materials that exist on how to apply 9.41 that the police have been doing for decades and using that training. That may not be the full extent. It may just not be written training. The NYPD's police department training is always updated. There is always in-service training. There is roll call training. There is a lot of different elements to it.

But they are not -- they get a lot of training in how to implement 9.41 as part of their normal job, and there is a procedure which was alluded to, the patrol guide procedure, which has a lot of safeguards, like circumstances under which they should call for help or they should call for supervisors where they should call for emergency services. It specifies they should call for EMS. There is a lot of rules surrounding how to implement 9.41. But the basic standard is always the same.

They have the guidance of the FINEST message, which I just read that they just received. The FINEST message is the most that, as far as I know, most police officers would have

seen about this particular initiative.

The NYPD is in the process of finalizing and rolling out additional training this week in conformance with the initiative.

THE COURT: How long will it take to train all these people on the initiative?

MR. SCHEINER: Your Honor, I'm not sure. We have a large number of people in the department. I don't know the exact number. But last I heard, it was about 30,000. So I do not know for sure. I do believe that the training sergeants, who are the people primarily responsible for new training to in-service members for service outside the academy should receive their training on the initiative this week. In other words, it's in progress. The NYPD is moving quickly. But even under the current training, they are only being asked to do what they have always been doing. The current training explains to them specific circumstances where they can do that --

THE COURT: You say they have always been doing it. The fact of the matter, they have not been doing it. That's the whole purpose of the initiative, isn't it?

MR. SCHEINER: They might have. It's just that the city government determined that there were occasions when people could be taken into custody when it was not being done, not that it was never done, because the content of the

initiative is not prohibited by any existing policy. It's not prohibited by any law. It's within the scope of their current training. It's just circumstances that we are having supplemental training on to make sure that all the officers are aware of it.

In other words, it's not that there is -- was a hard-and-fast rule or any rule against this before. It's simply an explanation of, by the way, don't forget, you can do this too. You don't have to wait until somebody threatens suicide or jumps on the tracks. You don't have to wait until they jump in front of a car. You don't have to wait until they are passed out on the sidewalk, if they are bleeding or obviously injured or obviously starving or out in the cold, which will soon be the case in below-zero temperatures.

THE COURT: Ms. Droubi.

MS. DROUBI: Or, your Honor, they can simply be an incoherent person with an inability to take care of themselves and that's enough now. This is a new initiative. It's newly announced by the mayor, as the city attorney is stating. There is a training. They are moving quickly. There is a training timeline. Why would they be providing new trainings for a policy --

THE COURT: The mayor's statement, as I understand it, he believes he is doing a good thing for the people who have mental disease.

MS. DROUBI: That might be the case that he believes that, your Honor, but he has to do it -- in this role it has to be done in a manner that is consistent with the law.

What we are saying is that this standard, and counsel referenced a FINEST message, which has really problematic guidance for police officers who are now going to be policing mental health, just simply looking at an individual, saying they are incoherent is enough, and that's incredibly problematic. And new training on this initiative, we believe, would -- on an initiative that violates the law should be stopped.

THE COURT: Let me see if I have this right. From your standpoint or from Mr. Scheiner's standpoint, what the police are being summoned to do now, under the new guidance from Mayor Adams, is enforce the law that they could always enforce it in a way they have chosen not to enforce it the last six months. And the city's position is, we are just asking the police to do what they always could do, which is enforce the law. Is that correct?

MR. SCHEINER: Yes, your Honor, that's our position that's the case.

I would like to offer to your Honor a copy of the FINEST message, because it does not say what plaintiffs' counsel just alleged.

THE COURT: Didn't you submit that today?

MR. SCHEINER: No, your Honor. I did not submit it with either of my letters, but I have a copy here for the Court, if you wish.

THE COURT: Do you have any objection, Ms. Droubi?

MS. DROUBI: No objection, your Honor.

THE COURT: Hand it up.

What's the part that you object to, Ms. Droubi?

MS. DROUBI: That an individual -- police may remove a person for evaluation when the person appears mentally ill and incapable of meeting basic human needs. It goes on: To such an extent when the person is likely to suffer physical injury or serious harm without immediate attention.

But it gives examples. Examples include: Inability to care for oneself. For example, an incoherent person may be unable to assess and safely navigate their surroundings. It goes on: May suffer from a serious untreated injury.

But the key is, mental illness and an inability to care for oneself; for example, an incoherent person. So a person who is mumbling on the street appears to have a mentally disability. This is now somebody who is at risk of getting involuntarily committed to a hospital by a police officer against their will.

THE COURT: But if the city can establish that this has always been the policy or has been the policy for an extended length of time, it's not a change. It's merely just

calling to mind to the police department what the limits of their discretion are. Your case would evaporate, wouldn't it?

MS. DROUBI: The mayor has announced a change in the patrol guide. This is a change in the policy. These aren't the same standards that existed in the police department as of two weeks ago. There is a change in the policy that is imminent. It was announced that they will be changing the patrol guide, that they are loosening the standard. That interpretation is --

THE COURT: Loosening the standards, but not changing the standards insofar as they exist under the law.

MS. DROUBI: We believe they are inconsistent with the law, and there is Second Circuit case law that supports our position, *Guan v. City of New York*, which says: To make a mental health arrest, police officers must consider whether probable cause exists to believe the individual is a danger to herself or others, that is, whether there is a substantial risk of serious physical harm to herself or others. That is inconsistent with a directive that says, appears mentally ill and incapable of meeting basic human needs, including being incoherent.

This is policing somebody for being homeless. This is policing somebody for having a mental disability and looking like they have a mental disability with nothing further, and that is inconsistent with the law, your Honor.

MR. SCHEINER: Your Honor, may I?

THE COURT: Yes.

MR. SCHEINER: It's easy to mischaracterize a document if you only pick and choose the words that you want to quote from the document.

But repeatedly what plaintiff's counsel has done is focused on particular words, like incoherent person, and left out the rest of it, which is the important limitation on what the police can do. What it says is: A person's actions or inactions may be evidence of mental illness and inability to care for oneself. For example, an incoherent person may be unable to assess and safely navigate their surroundings, e.g., avoiding on coming traffic or subway tracks. You can't erase those words from the message in order to make it improper, your Honor. In the city's view, it's entirely consistent with the standard articulated by the Second Circuit, as well as New York State law.

And what the plaintiffs are asking you to do is to say that this FINEST message and the mayor's initial statement, the mental health involuntary removal statements, are contrary to the Constitution or contrary to the ADA. There is no legal authority at all that says that. The legal authority that exists says that the standards articulated in these documents are the correct standards under 9.41 and are perfectly lawful.

So they are asking to make new law. They can make

that request if they have standing to do it, which we think they don't. And they can make the motion. If your Honor determines they have standing, your Honor can consider it.

But that's not something that should be rushed, to change decades of law to up end an initiative by the elected officials of the City of New York to save lives in an emergency proceeding.

As we indicated in our letter, if your Honor wants to hear the motion, we will litigate it, but it should be done in an orderly fashion, and we don't think it requires discovery about ongoing activities of the city to interfere with and burden city officials who are trying to implement this guidance in addition to all their other duties. The initiative stands or falls if on its face, your Honor.

THE COURT: Let me shift gears for a minute and ask the lawyers sitting at the first table whether they want to be heard on the issue of standing, New York Lawyers for the Public Interest or anybody else who wants to be heard.

MS. van DALEN: Thank you, your Honor, for the opportunity.

Your Honor, I appreciate my cocounsel has represented our interests in the arguments this morning. I would urge the Court, though, to consider that the organizations who have brought this claim do have standing. They have diverted substantial resources in addressing the illegal policies of the

city, as well we believe that Mr. Steven Greene, whose affidavit you have before us, is experiencing already irreparable harm due to the change in the policy. He is no longer leaving his home out of fear of being arrested. Thank you, your Honor.

THE COURT: That's the standing. He has standing because he is afraid to go outside. Is that it?

MS. van DALEN: Mr. Greene has standing because he has already been injured by the policy, by the city's policy, by being arrested and detained and taken to a hospital and by living in fear of this new policy as a person who has been diagnosed with a mental illness. And the organizations have standing based upon the diversion of resources that they have had to incur as a result of the defendant's policies.

THE COURT: Anybody else want to be heard on this?

MS. van DALEN: Thank you, your Honor.

THE COURT: Thank you.

Mr. Moore.

MR. MOORE: No, Judge.

THE COURT: Mr. Scheiner.

MR. SCHEINER: Yes, your Honor. If I may respond briefly on the standing issue.

THE COURT: Yes.

MR. SCHEINER: We haven't had the opportunity to fully brief standing for the current motion. We did brief standing

in our prior motion to dismiss, although not for the individual's request for injunctive relief but only for the organizations who, as we understand it, are seeking only injunctive relief in the underlying case, as well as the present motion.

But the case law, and we cited I think one case in our recent letter, but there is a lot more we can cite if we have the opportunity to brief it, says that when organizations are engaged in advocacy, as a principal part of their function, that efforts that they make to advocate on the issue that they are concerned about do not establish standing because that's bootstrapping.

That's like saying that a person who writes to their congressman has standing to challenge a law they don't like. It's not the case. They have to be injured in some concrete way that is unrelated to their advocacy function, which they have chosen to engage in.

I want to point out that on the websites, which we haven't cited before, because we were on a motion-to-dismiss posture before, but the websites of all these organizations state as one of their goals is to severely curtail or eliminate the role of law enforcement in the provision of care to the mentally ill under 9.41 and 9.58 and other statutes. That's been their longstanding goal as a political matter, and they are free to advocate for that, to pursue that in elections and

legislatively and with free speech. But it doesn't give them a light to come into court and try to essentially micromanage or conduct an inquisition against the city because the city is engaged in a policy that they don't like.

THE COURT: What about their position as an *amicus curiae*?

MR. SCHEINER: Your Honor, *amicus curiae* would require that there be somebody with standing to bring that claim. As we have said before, Mr. Greene, none of the plaintiffs have been subjected to this initiative and their subjective fear of it does not create standing. Standing is not a subjective standard. It's an objective standard of actual harm or imminent danger of harm which they haven't established, which is entirely speculative. Without even a single example of somebody who was taken into custody because of the initiative without probable cause. Not a single example, your Honor, which plaintiffs concede.

In other words, nobody has standing. We also don't think that the -- these organizations are appropriate or necessary as *amicus curiae* for a case of this nature. It's not something that has been raised before. I am not taking like a final position on that, I guess we would want to consider our position on that. But nobody has standing to challenge the initiative, your Honor.

MS. van DALEN: Your Honor, may I speak on standing

further?

THE COURT: Yes.

MS. van DALEN: Thank you.

We respectfully dispute the characterization of standing on the circuit, as stated by opposing counsel. This issue has been briefed in the motion-to-dismiss papers. The organizations, including Community Access, Correct Crisis Intervention Today NYC, and NAMI NYC each have standing to bring this action.

As is pointed out in our complaint and in our briefing on the partial motion to dismiss, each of these organizations has diverted resources from other policies and other priorities that they have to support people with mental disabilities and advocate for services and housing. Mr. Greene lives in supportive housing and he believes that when he comes and goes from his housing that is provided to people like him who have mental disabilities that he is vulnerable to the police under this new policy.

Thank you, your Honor.

THE COURT: Thank you.

Anybody else want to be heard?

I'll have a decision four shortly. Thank you very much.

MR. MOORE: May I?

THE COURT: Yes.

MR. MOORE: One additional thing. This lawsuit began as a challenge to the policy of the police department and how they were enforcing the laws against people who have a mental health crisis. We have alleged in our complaint, in our original complaint and our amended complaint, that the police department has inadequately trained and inadequately supervised officers throughout the years, going back at least to the *Eleanor Bumpers* case in 1984, that that has a pattern and practice over the years. We give you 22 examples in our amended complaint of individuals who have been harmed by this policy.

So what we were faced with a week ago was in the context of a policy that could not be implemented solely by police, but now a change in the policy that we believe lowered the standard. That's why we moved this Court for the relief.

It would seem to me, given the fact that Mr. Scheiner has admitted that they have not even started implementing the policy yet, they don't even have an idea of what the training is yet, that holding that action in abeyance for us to do some initial discovery, to do a 30(b)(6) deposition of a witness and the police department to find out what the heck is going on here was appropriate and that's what we stand on today, Judge.

THE COURT: Do you think you ought to amend your pleadings?

MR. MOORE: We can do that if the Court thinks. I

don't think we do because I think the basic premise of the lawsuit is that the police department is not the vehicle alone to deal with people in mental health crisis on the street.

Clearly they play a part, but you have to involve, as these organizations have fought for for many years, mental health professionals in that assessment. You can't ask a rookie cop to determine whether somebody sitting on a bench at a subway station -- not on the track. That's an extreme example, and Mr. Scheiner knows it. Nobody is saying they shouldn't get help. But if you're sitting on a bench and you look homeless, you can't ask a rookie cop to go up and say, well, he seems incoherent. Maybe the person doesn't speak English. Therefore, they are incoherent. Maybe they can't care for themselves. Maybe they don't have money to get housing or to get food.

THE COURT: We can all agree that this has not happened yet.

MR. MOORE: I think that's part of what the problem has been historically, that the police department overpolices those situations, not just in the subway context, but --

THE COURT: Mr. Scheiner's view is of the view that it underpolices.

MR. MOORE: I know Eric Adams said for 20 years he walked by those people and did nothing and now they are going to start doing something. I don't think that's what

Mr. Scheiner said. I think what he's saying is, everybody should get out of our way because this is a police matter, and you can't interfere with what the police are doing because of the state mental health code.

We don't think that's constitutional, given how it has been applied over the years, and we think this new policy even makes it easier for the police to abuse that power to take people involuntarily against their liberty into a hospital setting where they may or may not get any kind of service. if they come in the front door, they will be shown out the back door. That's our concern, Judge.

THE COURT: Thank you, Mr. Moore.

MR. SCHEINER: Your Honor, may I respond to the recent comments?

THE COURT: Yes. Briefly.

MR. SCHEINER: Thank you, your Honor.

I think is this is very much a moving target. Mr. Moore started talking about excessive-force cases. There is nothing in the initiative about excessive force. That is something that is one of the prongs of the plaintiffs' initial complaint, but the initiative has nothing to do with standards for use of force.

And it sounds to me like Mr. Moore is saying that this is really a preliminary injunction based on the initial complaint, which it's not and it's very surprising, considering

the initial complaint is quite long. Not the initial. The amended complaint is 62 pages and over 350 paragraphs, your Honor, and it doesn't ask for a preliminary injunction. and plaintiffs have not sought one until now. The current motion is about initiative, your Honor, and the amended complaint is the subject of a motion to dismiss, which we think are valid and we would appreciate -- we think is valid and we would appreciate oral argument on.

I also want to point out that Mr. Moore has used hypotheticals that are not drawn from any event that we have heard any evidence about. They are contrary to the hypotheticals given in the written guidance that's been issued by the city as part of the initiative, which I think is clear and I won't rehash all that.

I also want to point out that only two plaintiffs have put in evidence with respect to standing, CCIT New York and the individual plaintiff, Mr. Greene. We think that evidence is insufficient to establish standing, which is jurisdictional. If the other plaintiffs think they have the better case for standing, they should be required to put in some evidence, but they haven't.

Unless your Honor has questions, I think that concludes my response.

THE COURT: Thank you very much.

MS. LOWENKRON: Your Honor, may I be heard for one

second, since you invited others to speak briefly?

THE COURT: Yes.

MS. LOWENKRON: Thank you, your Honor.

I think that we are being put, as plaintiffs, in a very unfair situation here by the attorney for the city in that he says, in the one hand, there is nothing new about this initiative, yet, the other hand, he speaks of this in fact as a new initiative where they are going to be interpreting things differently. Plus, it's irrelevant if it is an interpretation difference or a written difference. The reality is, it is an absolutely new initiative where the mayor went on a press conference --

THE COURT: So you say. You say it's absolutely different. He says it's precisely the same thing.

MS. LOWENKRON: But he doesn't say it's precisely the same thing. Every other sentence is suggesting that in fact this is new because it is in fact going to be telling police officers a different way of doing things, and we think that that different way is even worse than the first way, but it's definitely different, and I think that there is a speaking out of both sides of the mouth on that, your Honor.

THE COURT: Thank you, Ms. Lowenkron.

MS. LOWENKRON: Thank you, your Honor.

(Adjourned)